REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

JERRE S. WILLIAMS*

THE COMMITTEE

The Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York was released on July 9, 1956.[1] Preceding the completion of this report was almost a year and a half of devoted work and deliberation by the nine distinguished practicing lawyers who made up the Committee. The Chairman of the Committee was Mr. Dudley B. Bonsal of New York City. Of the other members, four were from New York City, and one each was from Washington, D. C., Chicago, New Orleans, and Los Angeles.[2] In political alignment, the Committee consisted of five Republicans and four Democrats. In its work it was assisted by a staff consisting of two law teachers and two practicing lawyers under the able direction of Professor Elliott E. Cheatham of Columbia Law School.

This study was undertaken by the Association of the Bar of the City of New York under the leadership of its President of that time, Mr. Allen Klotz. In a report to the Bar Association describing the inception of the Committee, Mr. Klotz stressed the fact that there have been expressions of concern from many sources about the operation of the Federal Loyalty-Security Program. This widespread concern led the Association to conclude, "There is serious need for a non-partisan and independent review."[3] Following this same theme of an independent group of lawyers engaging in this vital inquiry, the Committee itself says in its Report:

> Some may think it presumptuous for private citizens to take upon themselves the responsibility of proposing to our government far-reaching changes in this field. We deem it appropri-

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*Professor of Law, University of Texas Law School; Associate Director of the Staff of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York, 1955-1956.

[1] REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Dodd, Mead & Co., (1956). Hereafter this report will be cited: NEW YORK CITY BAR REPORT.

[2] The members of the Committee, other than the Chairman, were: Henry J. Friendly, Harold M. Kennedy, George Roberts and Whitney North Seymour, all of New York City; Richard Bentley of Chicago, Frederick M. Bradley of Washington, Monte M. Lemann of New Orleans, and John O'Melveny of Los Angeles.

[3] See Dudley B. Bonsal, "The Federal Loyalty Security Program," The Association of the Bar of the City of New York, p. 3 (1956).

> ate that members of the Bar should do this. Indeed, as we conceive it, our duty as lawyers requires us to do so. The Bar of the United States has always been, and must always be, alert in the protection of the liberties on which our country was founded as well as of other measures essential to national security. It is so, in fact, with lawyers in every country where freedom exists or is emerging. It is only in the countries where freedom is rejected that the right and duty of the Bar to protect the liberties of the citizens are denied or suppressed.[4]

It was a grant of $100,000 from the Fund for the Republic, Inc., which provided the financial support for this undertaking. In accepting this grant, the Association of the Bar of the City of New York operated under its customary understanding that the Committee was to work with complete independence. This understanding was scrupulously regarded throughout.

The report which is here reviewed is most decidedly the work of all members of the Committee. The entire membership met on the average of once every two months in New York City, and the New York members met more frequently. The Committee and staff consulted with approximately 150 persons who are experts on all or at least some phases of the personnel security problem.[5] All shades of opinion were represented in this group of persons interviewed. Many of them were Government officials responsible for the operation of the programs. The cooperation and contribution of all of these voluntary consultants places the Committee and staff much in their debt.

In addition to the consultation with this group of informed persons, the Committee made an extensive survey of the published writings in this area. In a number of instances, all the Committee members read the original works. In others, the staff researched the wide range of miscellaneous publications and digested them for the use of the members.

The culmination of this inquiry took place in the spring of 1956 when the full Committee met in New York to consider and revise mimeographed copies of the entire report. At this meeting, the report was gone over page by page. The resulting published book has, in its entirety, the imprimatur of every member of the Committee.

The Report

In addition to the Committee's recommendations and appended statements supporting them, the report contains a thorough yet succinct

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[4] New York City Bar Report, 24. In the same connection, the Committee referred to the "Act of Athens" of 1955, wherein the assembled jurists of forty-eight free countries recited their devotion to the "rule of law" and stressed the responsibilities of lawyers to foster and preserve the "rule of law." *Id.*, at 25.

[5] The persons with whom the Committee consulted are listed on pp. xiii-xxii of the New York City Bar Report.

evaluation of the Communist menace and the security measures which a liberty-loving nation may properly take to counter them. In the literature in this area it is often stated that liberty and security are competing concepts. Liberty creates inroads upon security and security restricts liberty. The first chapter of the report evaluates this thesis and concludes that "there is no irreconciliable conflict between liberty of the citizens on the one side and national security on the other."[6] The approach of the Committee is that in striving to achieve security we dare not lapse into the oppressive measures of the Communist enemy. To do so would result in the sacrifice of what we are trying to achieve. This idea is most graphically put in the initial chapter of the report in these words: "We can never equal the Communist countries in enforced internal conformity. Their history and efficiency in suppression and regimentation are abhorrent to us. If we engage them on that line, we shall lose."[7] It is concluded that much of our strength must come through liberty rather than by restricting it.

The dangers from Communism are fully recognized in this report. Chapter II constitutes a trenchant summary of the Communist problem. The Committee calls Communism "the weapon as well as the creed of the most aggressive and imperialistic of modern nations."[8] It also recognizes this enemy as a "new kind of imperialism" which "seeks to destroy not only our nation but the ideals of liberty for which our country stands."[9] Whereas other aggressive movements like Nazism and Fascism were based on nationalism, Communism is based on a spurious sort of internationalism which enables it to attract dupes in all countries. This, in turn, means that the dangers from internal subversion are much greater from Communism than from an alien nationalistic movement. The Committee reveals itself as fully aware of these dangers.

Chapter III of the report sets forth the counter-measures which the United States now uses and has used in the past to counter internal threats to security. The federal statutes directed against subversive activity are listed and discussed as are other measures such as counter-espionage, enforced publicity of information about subversive organizations, and control of emigration and immigration. Demanding particular stress are the Civil Service requirements, since they fulfilled a need for loyalty and security inquiry before the loyalty-security programs were created, and they still fulfill a large measure of this function. Under the suitability requirements of the Civil Service regulations grounds for discharge are stated which closely parallel the

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[6] NEW YORK CITY BAR REPORT, 21.

[7] *Id.*, at 23.

[8] *Id.*, at 3.

[9] *Id.*, at 21.

security criteria of the present loyalty-security program.[10] In addition, the regulations include as a ground for removal the key standard of the earlier loyalty program: "Reasonable doubt as to the loyalty of the persons involved to the Government of the United States."

The focus of the report is not wholly upon internal security measures, such as the personnel security programs, as counter-measures to the Communist threat. The Committee sees the security of the United States depending ultimately on the strength of the nation and lists other elements of national strength in addition to internal security. The three listed and briefly discussed in Chapter III are "positive or dynamic security," "military security," and "international security." Military security and international security need no further definition. But positive or dynamic security may. It is emphasized a number of places in the report that political and economic liberty are the source of much of our national strength. A particular impact of this element of strength is the role that our economic system plays in scientific and industrial progress. This progress gained through freedom is what the Committee calls positive or dynamic security.

The civilian personnel security programs are described in Chapters IV and V. Chapter IV sketches the programs vertically, that is, program by program.[12] It also includes a detailed discussion of the previously mentioned Civil Service laws and regulations which have a security impact. There is a separate section describing the program for the classification of information. Classification plays a major role in the personnel security system. It defines the scope of the Industrial Security Programs of the Department of Defense and Atomic Energy Commission since the security clearance there involved has to do solely with access to classified information. It also plays a major role in defining the impact of the Federal Employees Program since access to

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[10] *Id.*, at 55.

[11] *Ibid.*

[12] Briefly, the various civilian loyalty-security programs are as follows: 1) The Federal Employees Program, applicable to government employees generally; 2) The Atomic Energy Commission Program, applicable to its employees and to employees of private businesses contracting with the AEC; 3) The Department of Defense Industrial Security Program, applicable to employees of private businesses contracting with the D.O.D.; 4) The Port Security Program, applicable to merchant seamen and longshoremen; and 5) The International Organizations Employees Loyalty Program, applicable to American citizens employed by or to be employed by international organizations.

While the various programs operate under different statutory authorization and regulations, the basic statute and executive order setting up the Federal Employees Program are properly viewed as the core of the programs insofar as there is such a core. The statute is Public Law 733 of 1950, 64 STAT. 476, 5 U.S.C. §22-1 (1952). The Executive Order, based upon this statute, is No. 10450, 18 FED. REG. 2489 (April 27, 1953). The statute and particularly the Executive Order set the standard and define the criteria for most of the other programs.

classified information has much to do with the designation of a position as sensitive. Early in the Committee's deliberations it was recognized that the personnel security structure could not be evaluated without involving the program for classification of information. Because of this inescapable conclusion, the Committee recommendations encompass the classification of information as well as those measures dealing directly with personnel security.

The second of the two chapters describing the present programs has a horizontal approach. All of the programs are compared one with the other at each stage and with regard to each significant aspect. The wide diversities among the present programs are here revealed. These diversities cover a broader range than is popularly realized. Simply as examples could be mentioned the central screening board utilized by the Department of Defense in contrast to the lack of any formal screening process in the Federal Employees Program. Again, the Atomic Energy Commission often uses hearing boards composed entirely of private citizens, whereas the hearing boards under the Federal Employees Program must consist wholly of persons federally employed. The hearing board in the International Employees Loyalty Program is a permanent board and in the Port Security Program uniquely consists of a hearing officer from the pool established under the Administrative Procedure Act and one union and one employer representative. The Committee suggests in this chapter that a selective use of the best features of the various programs could do much to improve all of them.

In the statistics set out in Chapter VI and in Appendix A, the report makes a significant contribution in bringing together the available figures covering the operation of the various civilian personnel security programs. These statistics reveal that about six million civilians are now subject to security clearance. The statistical pattern of the granting and denying of clearances in each of the various programs cannot be reproduced here. As an example, however, the statistics under the program applicable to federal employees can give the general pattern. In the two years from July 1, 1953, to June 30, 1955, the figures show that 727,158 persons were subjected to security check. Out of this number there were 1,016 suspensions from employment, and this figure can be taken as approximating the number of persons against whom security charges were filed. During approximately the same two-year period 342 employees were terminated under the Federal Employees Program. Also, in this same period there were 3,241 other terminations which took place under the regular Civil Service suitability procedures but which were declared by department heads to be "because of security questions." These persons have been included in the Government's statistics as having been discharged for loyalty-security reasons even though their discharges did not take place under the loyalty-security program.

Chapter VI also undertakes to give some idea of the monetary costs

of operating the personnel security structure. It is generally recognized that there is no accurate way to determine these costs with any degree of completeness because the figures do not include overhead. The costs specifically attributable to the operation of the personnel security program for the one fiscal year ending June 30, 1955, as reported by governmental departments and agencies, were $37,413,267.

The final chapter of the report, before the recommendations and their supporting statements are reached, (Chapter VII), undertakes to assess the achievements and intangible costs of the program. In this chapter the Committee assays some general conclusions as to the thrust of the present personnel security system on the well-being of the nation. One conclusion is that our present personnel security system is, to some extent, hampering positive security (scientific and industrial progress) and that this justifies an attempt to modify the program so as to avoid as many risks to positive security as possible.

Concern over the effect which the personnel security program has had on the international standing of the United States is also emphasized in this Chapter. The Committee says that there is evidence that the personnel security program, "unique in its scope and methods among democratic nations, has offended our friends and thereby aided our enemies."[13] The addresses of President Eisenhower and Chief Justice Warren to the American Bar Association in 1955 are quoted to reveal the stress which each speaker placed upon the importance in the present world struggle of adherence to our ideals of freedom and justice.[14] The Committee concludes that these views "must weigh heavily in the directin of some refashioning of the present system."[15]

It is recognized that the program has contributed to the purpose of blocking the Communist efforts within the United States to an extent which cannot be precisely determined. A relatively small number of employees have been dismissed or denied security clearance. But, in addition, the very existence of the program undoubtedly has discouraged attempts to obtain government and sensitive industrial employment by potential dupes and subversives. On the other hand, it is recognized that many persons believe the program has discouraged the acceptance of government employment by able and independent-minded persons who are in no sense Communists. It has also, to some degree at least, lowered the morale of not only those against whom security charges have been filed but of others who are their friends and associates. On balance, the Committee believes that the morale of government service has suffered

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[13] NEW YORK CITY BAR REPORT, 127.

[14] Dwight D. Eisenhower, "The Spirit of John Marshall: Crusader for Ordered Liberty and Justice," 41 A.B.A.J. 1005, 1006 (1955); Earl Warren, "Chief Justice John Marshall: A Heritage of Freedom and Stability;" 41 A.B.A.J. 1008, 1010 (1955).

[15] NEW YORK CITY BAR REPORT, 129.

but that these effects could be largely eliminated under a revised program.

Finally, the Committee expresses its concern over the effect of the program on the national ideals of justice and fairness and upon the increased governmental intervention in private affairs which it entails.

The conclusion of this chapter reports that with few exceptions the informed persons with whom the Committee conferred, agreed there is need for a personnel security program. The Committee itself states that this is "altogether clear."[16] But, almost all of these same persons agreed that changes were desirable, although there was disagreement on the extent and nature of the changes. The Committee states that its own views lie between the extremes of radical and wholesale revision at one side and minor adjustments at the other. Its recommendations are said to be within the general framework of the present personnel security system except for the rceommendation as to a greatly reduced application of the program.

The Recommendations

It is well to emphasize at the outset of the consideration of the Committee's recommendations that the report itself is not only the best evidence of the Committee's views but can by its nature be the only accurate evidence. An attempt, as this article must be, to paraphase and review the report unavoidably involves some shifting emphasis and diminishing accuracy. This discussion of the Committee's report, then, cannot be taken as a precise reproduction of its views. The responsibility here must be that of the writer and not the Committee. This is not to say that the writer will consciously depart from the report. Rather, it is simply to define, as a protection to the Committee, the limitations upon any attempt to convey the substance of the report in less than its own words.

A reading of the conclusions and recommendations of the Committee, together with the statements in support of them, reveals that there are five principles which continually undergird the various recommendations. These five principles are laid bare by reference to them several times in the report and more particularly in the supporting reasons given for the various recommendations. In a sense, it can be said that these considerations lead to the recommendations made; that is, they had much to do with the recommendations being what they are.

First, the menace of Communism is real and it is serious. Yet, in countering this menace we must do so in the framework of traditional American ideals lest we lose these ideals in trying to preserve them.

Second. Those aspects of the present program which are found wanting, in the sense that recommendation is made that they be changed, should not be taken as justifying the fastening of blame upon any individual or group of individuals. The current loyalty-security

[16] *Id.*, at 134.

program is a "crash" program created by a Democratic administration and revised and renewed by a Republican administration. Some unfairness and inadequacies are bound to creep into any such crash program. But now what we once hoped would be an emergency of short duration has turned into a long-continuing danger. The time is propitious for the creation of a security program with which we must live throughout the foreseeable future.

Third. The application of personnel security measures must be limited to those individuals who are in a position to do significant harm to our nation. This consideration not only underlies the Committee's recommendation on the coverage of the program, it also defines and explains the nature of the other recommendations since they are made in the light of a program greatly reduced in coverage.

Fourth. The fact that an aspect of the loyalty-security program complies with constitutional limitations does not end inquiry as to its merit. The Constitution only sets the outer limits of governmental power in enforcing security and the minimum of protection for the individual demanded by liberty. For a procedure or a substantive rule to be wise and just may demand something different from minimum constitutional compliance.

Fifth. Clearance of an individual under the loyalty-security procedures can be as great a benefit to the Government as denial of clearance. It is easy to assume that once anything of the slightest questionable nature in a person's background is discovered, the interest of the Government lies wholly in denying clearance. If such an assumption is made, it logically follows that the only justification for the detailed security procedures is the protection of the rights of the individual. This whole assumption is faulty because it overlooks the positive advantage to the Government of having trained and competent employees. If an individual is denied security clearance on untenable grounds, the Government is as much the loser as is that individual.

The Committee made eighteen numbered recommendations for changes in the Federal Loyalty-Security Program.[17] Perhaps it would be more accurate to say eighteen groups of recommendations were made, since typically a numbered recommendation contains a series of suggested changes. These recommendations, together with the statements supporting them, are to be found in Chapter VIII of the report. Each recommendation will be paraphrased in turn, as a number of them are too long for reproduction in full. Following the statement of each recommendation there will then be a sketching of the reasons advanced by the Committee in support of that recommendation.

[17] Number 18 of the recommendations simply suggests that the collective name of the security programs should be "The Federal Personnel Security System." There is no supporting comment in connection with this recommendation as there is with all the others. This recommendation will not be discussed further.

Coordination and Supervision

Recommendation: A Director of Personnel and Information Security should be established in the Executive Office of the President. It would be the primary responsibility of the Director to conduct a continuous review of and supervision over the personnel security programs and the classification of information. The Director would not have any responsibility over particular security cases. Rather, he would be concerned with the overall operation of the program, including efficiency, uniformity and fairness of administration. Specific duties in connection with review of particular aspects of the program and the establishment of regulations are assigned to the Director in other recommendations. These will be pointed out when those recommendations are discussed.

While it is customary to refer to the loyalty-security program for federal employees as a single administrative program, in fact there are approximately seventy such programs, one for each separate Government department or agency. Each agency may have its own set of regulations, procedures, and boards and apply the program in its own way subject only to the general limitations contained in the basic order, Executive Order 10450. The multiplicity of programs and the decentralization of responsibility in administration are harmful. Decentralization means that separate clearances are required for employees in successive tasks or even in a single task crossing agency lines. In addition, the requirement of clearance on an agency basis results in lack of uniformity in the decision regarding clearance as an employee moves from one agency to another. This lack of coordination in the Federal Employees Program has led to the establishment of various governmental committees with some measure of responsibility in coordination but without clear definition as to what those responsibilities are. It is believed that a single official with overall authority would fix the responsibility for coordination and supervision effectively.

One of the most significant duties of the Director would be to conduct a continuing appraisal of the programs and to press forward with appropriate recommendations for change. The suggestion that this official also be responsible for the overall supervision of classification of information stems from the fact that information classification in large measure defines the scope of the personnel security structure.

Scope

Recommendation: Clearance under the personnel security program should be required for all sensitive positions and for no others. Sensitivity of position should be designated by the head of each department or agency and should include only those positions in which the occupant would have access to material classified as "secret" or "top-secret" or would have a policy-making function which bears a substantial relation to national security.

On the basis of the government's own figures, this recommendation would reduce the number of persons covered by the civilian loyalty-security programs by more than seventy-five percent. From 500,000 to 600,000 of the present 2,300,000 federal employees are in sensitive positions under the current definition of sensitivity. And this definition of sensitivity is broader than that recommended by the Committee. Only about 800,000 of the approximatly 3,000,000 persons covered by the Department of Defense Industrial Security Program are in sensitive positions under the Committee recommendation. The number of employees requiring clearance under the Atomic Energy Commission's program would be reduced somewhat below the present approximate figure of 80,000. The Port Security Program and the International Employees Loyalty Program, involving about 800,000 and 3,000 persons respectively, would be eliminated entirely. There would be an overall reduction of persons covered from about 6,000,000 to less than 1,500,000.

Sensitivity would be determined by position and not by agency. Some nonsensitive agencies might have high officials with policy-making functions bearing on national security. On the other hand, the Department of Defense, clearly a sensitive agency, nevertheless has a large number of employees who are not in sensitive positions in that they have no policy-making functions nor do they have access to "secret" or "top-secret" information. In drawing this limitation, however, it is pointed out that sensitivity must include positions which involve opportunity for unauthorized access to classified material as well as those involving authorized access. So, the position of a secretary or janitor who has opportunity for access to the files or even the waste paper of a sensitive position would be classified as sensitive.

The recommended definition of sensitivity involving access to information classified as "secret" and "top-secret" would end the requirement of clearance for employees having access to information classified as "confidential." Consultation with many persons who have access to classified information led the Committee to conclude that the nature of information classified as "confidential" is such that danger to the national security would arise only from a very broad disclosure, such as no small group of persons could accomplish. Support for this position is gained by pointing out that the Department of Defense delegates to private employers the authority to clear individuals for access to information classified "confidential".

It is recommended that the Port Security Program, applying to all merchant seamen sailing under the American flag and to longshoremen who have access to restricted port areas, be abolished. The elimination of the program follows automatically from the recommendation that personnel security measures be applied only to those persons having a substantial policy-making function and those having access to "secret"

and "top-secret" information. The merchant seamen and longshoremen fall into neither of these categories.

The statement in support of this aspect of the scope recommendation points out that the justification for this program must be found largely in the purpose of preventing sabotage and in the less common additional purpose of preventing sailors from serving as couriers for espionage. The Committee takes a firm stand against using these grounds as justification for a personnel security program. It sees any program based upon the prevention of sabotage as opening the way for the introduction of personnel security measures throughout American life. It is pointed out that the sabotage of a large power plant or bridge or municipal water system would inflict a greater injury on our nation than destruction of a merchant ship or of dock facilities. Also, such forms of sabotage are almost as readily accomplished by persons who are not employed by the instrumentality involved. Following the same reasoning it is further pointed out that passengers can serve as couriers for espionage just as easily as crewmen.

If the nation embarks on personnel security clearance of employees to prevent sabotage in one segment of industry, the logic of the policy would call for its extension widely throughout industry and business. Even this would not be enough because those who are not employees of important installations might still sabotage them. The culmination of this reasoning would lead to peacetime personnel security clearance for almost all citizens. The Committee states: "The danger to liberty from such a course should cause us to set ourselves resolutely against it."[18] Counterespionage and adequate physical protection of vulnerable installations are singled out as the kind of measures that should be used to guard against sabotage, these measures being those upon which we have relied in the past.

The recommendation on the elimination of the Port Security Program is tempered by a statement that the Government should not be precluded from establishing a reserve of investigated seamen and longshoremen for use in time of national emergency.

The International Organizations Employees Loyalty Program also would be eliminated under the recommendation. International employees are seen as wholly outside the objectives of a loyalty-security program. They obviously have no access to classified information nor do they have anything to do with the making of United States policy. A positive harm in the operation of the international program is seen. The time it takes to obtain clearance is such that international organizations are discouraged from hiring American citizens, especially for short term work. This, says the Committee, may well lead to the employment of foreign Communists in place of American citizens. Further, since

[18] NEW YORK CITY BAR REPORT, 144.

the United States is the only nation that has a formal program for its citizens going into employment in international organizations, it is feared that needless offense may be given to other nations. This is because it is an overt assertion by this nation of special control over international organizations in which all member nations have an equal interest.

International organizations have their own methods of selecting, transferring and discharging employees. These methods are based upon a character investigation. In addition, the Committee again tempers this recommendation for the elimination of the program by stating that the United States should retain the power of investigating the qualifications of citizens employed by international organizations in exceptional cases where loyalty to a foreign power might interfere with this nation's interest. Without the existence of a formal program, such information could be turned over to the international organization for its consideration.

This seventy-five per cent reduction in the number of persons covered by the civilian personnel security programs would enhance rather than lessen the national security in the eyes of the Committee. Governmental efforts, including those of its trained security personnel, would be concentrated where they are needed. It is carefully pointed out that narrowing the personnel security program as recommended would not leave uncovered positions wholly at the mercy of Communists or other-subversives. Reference is made to the Internal Security Act of 1950, which bars from all federal employment any present member of a Communist-action, Communist-front, or Communist-infiltrated organization.[19] The general suitability requirement of the Civil Service regulations, covering loyalty as well as various personality weaknesses involved in security considerations, would also continue to apply to all individuals in the federal classified service.

Classification of Information

Recommendation: The Director of Personnel and Information Security should continuously review the standards, criteria, and methods used in the classification and de-classification of information. His recommendations, approved by the President, would be binding upon the federal departments and agencies.

The reason for including a recommendation concerning classification of information has been mentioned previously. Classification of information determines the scope of the industrial security programs and under the scope recommendation also plays a major role in defining the coverage of the program applicable to federal employees. The Committee is by no means the first group to point out the tendency to over-

[19] 64 STAT. 989, 992 (1950), 50 U.S.C. §782(4), §784 (1)(1952), as amended by 68 STAT. 777 (1954), 50 U.S.C. §782(4A) (Supp. II, 1955).

classify information and the danger of over-classification to positive security by preventing the free flow of information by which scientific developments are encouraged. This, of course, is a problem of balance between the obvious necessity for some secrecy and the importance of allowing the citizens of a democracy to know what their government and other citizens are doing.[20] Just as in the personnel security program for federal employees, there is need for a single overall authority responsible for supervising the classification of information. This recommendation is designed to fulfill that need.

The Standard for Personnel Security

Recommendation: The recommended standard for personnel security clearance can only be conveyed by quoting it in full. It is as follows:

> The personnel security standard shall be whether or not in the interest of the United States the employment or retention in employment of the individual is advisable. In applying this standard a balanced judgment shall be reached after giving due weight to all the evidence, both derogatory and favorable, to the nature of the position, and to the value of the individual to the public service.[21]

The recommended standard would be unencumbered by the problems of burden of proof which have caused many persons to assert that the present standard[22] weighs too heavily against the individual seeking clearance. Substituted would be a simpler test which would let the decision rest on a common sense judgment whether it is or is not advisable to grant clearance. Another difficulty with the present standard, particularly as it has developed out of the earlier loyalty programs,[23] has been the fact that in the eyes of the public the present program is viewed as still having loyalty rather than security as its basis. This has led to the drawing of unwarranted inferences of disloyalty as to employees removed. Since the recommended standard does not specifically

[20] President Eisenhower emphasized this need for balance in a statement released to accompany the issuance of Executive Order 10501 on Classification of Information. See "Hearings before a Subcommittee to Investigate the Administration of the Federal Employees' Security Program" of the Senate Committee on Post Office and Civil Service, 84th Cong., 1st Sess., Pt. I, pp. 32-33 (1955).

[21] NEW YORK CITY BAR REPORT, 149.

[22] The present standard under Executive Order 10450 reads that employment or retention in employment must be "clearly consistent with the interests of the national security." (Section 2).

[23] The original standard when the first loyalty program for federal employees was created by Executive Order 9835, 12 FED. REG. 1935, (1947) read: "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States . . ." (Pt. V, 1).

Executive Order 10241, 16 FED. REG. 3690, (1951), changed the standard to read: "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

refer to loyalty or to security as it applies to a particular person, ouster would not inflict the stigma which many have felt is implicit in a removal under the present program.

The standard calls for a "balanced judgment" which entails considering favorable as well as derogatory information against the individual. Also, there is no specific authorization in the present standard or criteria for an individual making a security clearance decision to take into account the value of the contribution which the individual being considered might make. There have been cases, and obviously there will continue to be cases, in which this is a significant factor to the advantage of the Government. The suggested standard includes this consideration.

The Employee's Associations

Recommendation: A person's associations with organizations or individuals may properly be considered in determining his security suitability. But a conclusion against his clearance on the ground of such associations should not be reached without adequate basis for determining that he shares, is susceptible to, or is influenced by, the actions or views of such organizations or individuals.

Here the phrase "guilt by association" is recognized as a term of condemnation sometimes applied to the personnel security program. The Committee views criticism on this ground as "a superficial approach which misconceives the problem".[24] It is stated that associations are taken into account as a matter of course in determining suitability for employment generally, and certainly it should not be otherwise when the question is that of security trustworthiness. It is emphasized that this view is related to the recommendation that the scope of the program be limited to sensitive positions.

The latter part of the recommendation is directed at insuring that an association must be meaningful before it is given security significance. It is claimed that much of the progress of our nation has been due to the enterprise of private organizations. Thus, it would be disastrous if membership in organizations became so generally suspect that citizens were afraid to join and participate in them.

The Attorney General's List

Recommendation: The Attorney General's List of subversive organizations should be abolished unless it is modified and revised. The recommended changes include: 1) no organization should appear on the list without having been given notice and an opportunity to be heard, 2) information should be given covering the general nature of the subversive activity and the period involved as to each organization listed, 3) no organization which has been defunct more than ten years

[24] NEW YORK CITY BAR REPORT, 152.

should be named, 4) periodical supplements should be used to keep the list up to date, and 5) the list should contain a statement that mere membership in a named organization is not in itself to be construed as justifying an adverse security determination concerning a member unless mmbership was illegal by statute. The Department of Justice should make available to persons administering the security program relevant information concerning all organizations the character of which may be pertinent in a pending inquiry. This information should be made available regardless of the existence or nature of the Attorney General's list.

A widespread misconception and misuse of the Attorney General's List has been recognized by the Committee. Too often former membership in an organization named has been deemed sufficient grounds for automatic denial of security clearance. Further, the misconception and misuse of the list has extended to states, municipalities and even private employers. Other weaknesses involve the lack of hearing given the organizations listed, the present static nature of the list, and the fact that it gives no indication of the times when listed organizations may be demeed suspect and the nature of their improper activity.

Security Personnel

Recommendation: Personnel engaged in security matters should be individuals whose qualities and standing will inspire confidence in the fair, wise, and courageous administration of the program. To this end, the Director of Personnel and Information Security should establish training courses for security personnel. These courses should involve intensive and thorough instruction in the nature of Communism and the techniques of Communist espionage and infiltration, the political history of the United States and of the world, constitutional and legal principles, and the relative reliability of various kinds of evidence.

The Committee found that present security personnel are, on the whole, effective persons of skill and ability. Many of them, however, have gained their skills primarily through experience as investigating agents. The training courses would be designed to give them the kind of broad knowledge which it is felt an effective security administrator must have. Certainly the nature of Communism and the threat it poses to our way of life is of the utmost importance. But also, persons administering the security program need to have some understanding of the reliability of various kinds of evidence to avoid having mere gossip and rumor carry the same weight as firm and persuasive information. Training in American constitutional and legal principles is obviously requisite to any person administering a program which may have an unfavorable impact upon an American citizen.

Central Screening Board

Recommendation: A central screening board should be created to

assume the responsibility of determining whether or not security charges should be filed. The board should act in panels of not less than three members, and at least one member of each panel should be a lawyer and one member should be a person whose only governmental employment is his work on the board. Subject to further action by the Director, use of the central screening board should not be required in the case of the Atomic Energy Commission and Department of Defense, although they may utilize it if they wish.

The Committee states: "A high percentage of persons are cleared after security charges have been filed against them. This seems to reflect care in the hearing boards but excessive filing of charges."[25] Screening is viewed by the Committee as perhaps the most significant procedural stage of the security program. The tremendous impact upon the individual against whom security charges are filed, even though that individual later is cleared, makes it imperative that security charges not be filed unless serious security questions are involved. Under the present program, except in the Department of Defense, the determination to file security charges is made by the agency which then prosecutes those charges. This means that there is a lack of independent evaluation of the security issue at this stage. An independent screening board would bring objectivity to the screening process. It could be viewed, in the words of the Committee, "as fulfilling a function somewhat analogous to a Grand Jury."[26]

The Department of Defense is excepted from the application of the central screening board recommendation because it now has an established independent screening board. The Atomic Energy Commission is excepted because it has a carefully organized security system which is to a large degree autonomous under separate statutory authorization.

It is proposed that a lawyer be a member of each panel of the central screening board because of the particular knowledge and skill which he would bring to the questioning of witnesses and the evaluation of evidence. The recommendation concerning having one citizen member on each panel stems from the belief that it would be helpful to include a non-governmental point of view. One panel member could fulfill both requirements.

It should be noted that the Director would be given authority to modify the recommendation by including the Department of Defense and Atomic Energy Commission in the operation of the central screening board or by authorizing the creation of separate agency screening boards in other agencies where he deemed this advisable.

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[25] *Id.*, at 159.

[26] *Id.*, at 160.

Screening Procedure

Recommendation: Screening boards should afford the employee involved an opportunity for an informal conference to answer adverse security information. Within the limits of security requirements, charges should be as specific as possible and should include all adverse information which is to be considered in making a security determination. In the event that charges are not specific enough to enable the accused to prepare his defense, the board should, in the exercise of reasonable discretion and within the limits of security requirements, furnish such additional information. Employees against whom security questions are raised should be entitled to have an attorney advise and aid them in preparing statements to be submitted to the screening board and should be entitled to the assistance of counsel during his appearance before the Board.

The Committee found that in the past there has been insufficient use of an informal interview with the employee against whom security questions have been raised. In such an interview questionable associations and activities can be aired and those matters which are satisfactorily explained can be discarded. Indeed, cases can often be disposed of in this fashion through effective explanation by the individual involved. Recognition of the value of the informal interview at this stage of security procedures is seen in an exchange of correspondence between Attorney General Brownell and President Eisenhower on March 4, 1955,[27] which, by stating some specific policies, led to various improvements in the administration of the security system.

One of the most important roles of the central screening board would be the determination as to whether an inadequate employee should properly be charged as a security risk as opposed to simply treating him as an unsuitable individual under the Civil Service procedures. The Committee urges that the screening board refrain from filing security charges except when a case is appropriate for application of the security program. Harm is seen in a security program so broad that it makes a security issue out of general inadequacies of personality and ability which are found in any large group of employees. Use of the security program to terminate such employees weakens the program because of the dilution of its objective and the stigmatizing of an employee which is involved.

It is recognized that the task of drawing security charges with sufficient definiteness to enable the charged employee adequately to prepare his defense, but at the same time to protect the interest of national security, is a difficult one. In this connection, the Committee cites the case of *Parker* v. *Lester*,[28] in which the Government did not

[27] This exchange of correspondence is reprinted in Appendix B of the NEW YORK CITY BAR REPORT, at 280.

[28] 227 F.2d 708 (9th Cir. 1955).

seek review in the United States Supreme Court. This case held that under Port Security Program merchant seamen must have fair and reasonable notice of all adverse security information used in making a security determination. On this problem, the Committee emphasizes again the importance of its limitation of the program to sensitive positions. It is the Committee's opinion that this case does not require that all security information, regardless of the interests of national security, be revealed in a program so narrowed. But, it is only the exceptional case in which the interests of national security would demand that some adverse information contained in the file not be made the subject of charges. This would be the kind of case where a detailed charge based upon information supplied by an undercover agent might reveal the identity of the agent and so threaten or destroy his usefulness. The Committee was told by some of its consultants that such cases are very few in number.

The importance of the assistance of counsel at the screening stage to an employee against whom a security question has been raised is an integral part of the recommendation. Assistance of counsel at this time is not only needed to protect the interests of the employee, but fullest presentation at the screening stage should assist the government in an early disposition of the security case.

Suspension of Charged Employees

Recommendation: The pay of a suspended employee should continue whether that individual is employed by the government or by a private employer. Whenever practicable, suspension should be avoided by allowing the charged employee to continue in his position if consistent with the interest of national security or by transferring him without loss of pay to a nonsensitive position.

Suspension without pay at the time security charges are filed places an exceedingly heavy burden upon the employee. Just when he needs financial assistance to support a long and costly proceeding, his pay is cut off. The harshness of suspension is particularly seen when it is realized that most of the employees who have had security charges filed against them have ultimately been cleared and back pay has been awarded to them. Thus, continuing pay during suspension would entail only a small additional cost to the Government for this greatly increased protection of charged individuals.

Hearing Boards

Recommendation: Hearing boards should consist of three members to be appointed by the head of the charging agency. One member but not more than one member of the board should be an employee of the charging agency, at least one member should be a lawyer, and at least one member should come from outside the government service. In

the alternative, a hearing board might be composed entirely of persons outside the government service, one of them a lawyer. The citizen member or members of such a board should be chosen from a panel maintained by the Director. In the appointment of hearing boards, consideration should be given to the value of continuity of service.

The emphasis here is upon diversification of hearing board membership. A special value in having one but no more than one board member an employee of the charging agency is recognized. Also, as on the screening board, it is felt desirable to have at least one member whose only governmental connection is his board membership. The practice of having at least one private citizen on a hearing board is now followed in all civilian personnel security programs except that applicable to federal employees. The alternative recommendation, that a board may be composed entirely of private citizens, recognizes as usful the practice of the Atomic Energy Commission which has frequently used hearing boards so composed, even though the sensitiveness of the positions under the AEC program is surely as great as anywhere in the security system.

Continuing service by board members is seen as valuable because of the experience and understanding which are developed. On the other hand, there is a disadvantage in constituting boards on a permanent basis. The Atomic Energy Commission regularly assigns to its hearing boards one member who is trained in the same professional areas as the person under charges. This brings valuable experience of another sort to the deliberations of the board. Hence, the recommendation is made that continuity of service should be given substantial consideration but should not be an absolute requirement.

Hearing Procedure

Recommendation: The charging agency should be entitled to have an attorney and other representatives, such as a security officer, at the hearing, but such persons should not participate in the deliberations of the board. Charged employees should be entitled to have an attorney present at the hearing to offer evidence and to examine and cross-examine witnesses. Hearing boards should make written findings of fact and conclusions which should be furnished to the charged employee with only such deletions as are required by the interests of national security. The charged employee should be furnished a copy of the transcript of the hearing. The security hearing should not be public.

Some of these recommendations on hearing procedure have already been instituted in the security programs through the normal processes of revision. Thus, the right of the charged employee to be represented by counsel is well established. So also is the practice of having an attorney and other representatives of the charging agency participate in the hearing. Even though regulations under the Federal Employees Program

indicate that the charged employee must purchase his transcript of the hearing, the practice has generally become to furnish him with a copy or at least make one available to him on indefinite loan. Except in Port Security, the hearing is not public under the present programs.

Emphasis is placed upon the importance of the attorney of the charging agency and other representatives seeing to it that all matters of defense known to them are brought to the attention of the board. In the Committee's words: "Security proceedings are just as successsful from the Government's point of view when employees are properly cleared and can continue to serve in sensitive positions as when there is denial of clearance for those employees who properly should not be cleared."[29] In the past it was the practice under some security programs to have the government attorney or other representative meet with the board in private and participate in its deliberations. This practice has largely disappeared. It should be wholly eliminated because it impairs the objectivity of the hearing board and places the charged employee at an unfair disadvantage.

In all the civilian personnel security programs, hearing boards make written findings of fact. These findings, however, are not communicated to the charged employee. Rather, he receives a decision which consists of no more than a statement that his retention in employment is or is not clearly consistent with the interests of national security. The present practice leaves a charged employee wholly in the dark as to the matters which are viewed as significant. The recommendation envisages that these findings be furnished to the charged employee subject only to the deletion of portions made necessary by security considerations.

The recommendation that security hearings not be public is related to the limitation of the program to sensitive positions where there would have to be a broad and delicate inquiry into security suitability for employment in a position calling for responsibility and discretion. The recommendation is also keyed to the Committee's calling for a significant increase in the amount of confrontation afforded charged employees. The report sees it as unavoidable that having open hearings would tend to lessen the extent of confrontation afforded because of the public notoriety involved in testimony in open hearing. No danger is seen that restricting attendance at the hearing to those directly concerned would conceal matters which ought to be known to the public generally, since a charged employee and his counsel would be free to make public their version of what took place.

Appearance of Witnesses and Confrontation

Recommendation: Screening boards and hearing boards should have the power, in their discretion, to subpoena witnesses. It should

[29] NEW YORK CITY BAR REPORT, 171.

be the policy of the Government to permit charged employees to cross-examine adverse witnesses before a hearing board when the hearing board believes this important for the development of the facts, unless the disclosure of the identity of the witness or requiring him to submit to cross-examination would be injurious to national security. Informants regularly providing secret information should not be identified and should not be required to appear before hearing and screening boards. But, wherever consistent with the interests of national security, the information furnished by regular undercover informants should be accompanied by data which would aid the board in evaluating the evidence, including a statement of whether it was obtained at first hand or through hearsay. As to all other witnesses the hearing boards should determine whether the witness should be produced for cross-examination, whether he should be interrogated by the board without the employee being present, or whether his evidence should be given to the board in other ways, as by affidavit or signed statement. So far as consistent with national security, the hearing board should make available to the employee the substance of all the evidence it takes into consideration which was given by witnesses the employee was not permitted to cross-examine. When there has not been confrontation all persons involved in the security determination should take into account the lack of opportunity for cross-examination.

The primary consideration underlying these recommendations on the appearance of witnesses and confrontation is the limitation of the personnel security program to persons occupying sensitive positions. Under a program so narrowed only those persons occupying positions of significant trust would be subject to security screening. The security inquiry as to persons occupying such positions properly should include inquiry into the character traits of the individual as well as the facts in his personal history. Thus, such an inquiry involves opinion evidence as to a person's character as well as factual description of his past activities. While it would be expected that individuals reporting significant factual derogatory material would be required to confront, except for the one instance mentioned below, requiring confrontation by a witness who simply gives his opinion as to the character and trustworthiness of the employee would constitute a serious inhibition on obtaining such valuable information. So the recommendation is made that the hearing board itself make the determination as to whether the witness would be required to appear and confront. This determination would be made, however, under the general principle that charged employees are entitled to the maximum amount of confrontation consistent with the interests of the Government in maintaining an effective program.

The specific exception to the right of the hearing board to determine whether there should be confrontation is in the case of regularly engaged undercover agents. Here it is concluded that the interests of

national security require that these agents not be exposed in security proceedings since the Communists would gladly sacrifice some of their own numbers to unmask them. The Committee asserts its conviction that counterespionage now furnishes the greater protection to internal security than does the personnel security system. If we were to impair the efficiency of counter-espionage, then we would have to develop a still stronger system of personnel security, one much more stringent and more difficult of application.

Much of the reason for the present failure of the Government to present witnesses in security hearings is caused by a lack of subpoena power. The Committee feels that the granting of subpoenas, together with reasonable allowance for traveling expenses and a per diem fee, coupled with the responsibility upon hearing boards to present witnesss for cross-examination whenever this can be done without destroying the efficacy of the program, eliminates most if not all of the present objections based upon lack of confrontation.

In support of its recommendation on this difficult matter, the Committee points to the British and Canadian experience in operating programs which are in scope similar to what our program would be if narrowed to sensitive positions. Neither Great Britain nor Canada has provision for full confrontation in their security programs.[30]

Attorneys for Charged Employees

Recommendation: Every employee against whom charges are filed should be entitled to obtain an attorney of his own choosing to represent him. In the event he is cleared at the screening stage he should be reimbursed in the amount of his reasonable attorney's fees, the amount to be fixed by the screening board. In the event there is a hearing and the employee is later cleared a similar reimbursement should be made, the amount to be fixed by the hearing board. The reimbursement for attorneys' fees should apply to employees of private employers covered by the security programs as well as government employees. Bar associations should be urged to make provision through lawyer reference plans or otherwise for adequate representation of employees in security proceedings.

The burden that now lies upon charged employees to hire their own attorneys is so great that it has been estimated that in from one-half to two-thirds of all security hearings charged employees have not been represented by counsel. The importance of the outcome of security proceedings to persons involved is so serious that the need for competent representation from the screening stage on is clear. Reimbursement for attorney's fees is viewed as preferable to assigning regularly employed government attorneys to defend those charged because the relationship between the employee and a Government attorney would be an extremely

[30] *Id.*, at 199, n. 51.

difficult one when the Government itself is pressing charges.

Reimbursement for attorneys' fees would not of itself solve the problem of obtaining counsel. The nature of security proceedings has regrettably made some lawyers reluctant to accept retainers in these cases. In addition, the unusual aspects of security proceedings may require special skills and experience for such work. Some state and local bar associations have already recognized the need for facilitating the obtaining of attorneys to represent employees in loyalty-security matters. The recommendation envisages a broad assumption of responsibility by bar associations to do this.

Final Determination

Recommendation: The head of the charging agency should have the power to make the final security determination.

This recommendation states the present practice. The Committee believes that there should be no change because the agency head has the best knowledge of the demands of a particular position and has the responsibility for the successful operation of his agency.

Under some of the programs there is a stage of review or appeal to another board after the hearing board's action and before final determination. The Committee leaves it to the agency head to establish such a review board if he wishes. But the responsibility is viewed as his, and there should be no requirement that he establish such an additional step.

Successive Security Determinations

Recommendation: The general policy should be the prevention, in so far as consistent with national security, of the repetition of security proceedings on substantially the same facts as to the same person. In the absence of new evidence a security clearance should not be re-opened. If there is new evidence, a security clearance should be subject to re-opening only with the concurrence of the screening board and the head of the agency concerned. The Director should promulgate regulations, including provisions for reciprocal recognition of clearances, wherever it is feasible to lessen repeated clearance.

One of the most unsettling aspects of the present security program has been the necessity for particular individuals to be cleared a number of times. This may be occasioned by re-opening a previous clearance, since there is no application of the principle of double jeopardy. It more commonly arises in the case of scientists and others who are employed from time to time on special governmental projects. In these instances, each time there is a new employment there must be a new security clearance. The recommendation is designed to limit instances of repeated clearances as much as possible.

It is recognized, however, that it would be unwise to go so far as to adopt fully the legal principle prohibiting double jeopardy. The Government in a security case is endeavoring to protect itself from

future betrayal by an employee. If an employee is in fact a bad security risk he should be barred from sensitive employment even though he was earlier cleared on the basis of the facts then known. Thus, full justice is done to the employee if re-opening is prohibited in absence of new evidence.

Job Applicants and Probationary Employees

Recommendation: An applicant for a sensitive position denied employment should, upon request, be furnished with a statement of all adverse security information concerning him or a statement that there is no such adverse information. Such statement should be as specific as security considerations permit. An applicant furnished with a statement of adverse security information should have the right to file an affidavit denying or explaining it. The affidavit would be placed in the personnel file which contains the adverse security information and would be part of any report of any future investigation of that person. A government agency should also afford an informal interview to an applicant or probationary employee in a sensitive position in any case where the general counsel for the agency recommends that an interview be given because of the importance of the employment of that person to the agency.

Applicants who are denied employment because of adverse security information, except in some instances in the Atomic Energy Commission, do not receive a statement of charges or a hearing. Such applicants may be repeatedly denied positions on the basis of adverse security information contained in their files about which they know nothing and which they could easily explain. Yet a danger is seen to the effective administration of the program if all applicants for positions were afforded the full procedural protections. Many persons could use these procedures when prospects for employment were almost nonexistent or only for the purpose of clearing their record, with no intention of pressing the application for employment after clearance.

The Committee views its recommendation as constituting a fair reconciliation of these competing factors. Applicants would be apprised of adverse security information contained in their files and would be given an opportunity to file an answering statement. Probationary employees now have this right, so no additional recommendation on this point is made with respect to them.

It is suggested that the Director should study this problem to determine whether additional protection to applicants should be instituted. If additional rights were given applicants, the Committee emphasizes that they should be directed only at the objective of clearing security records and that nothing should interfere with the power of an agency head or private employer to decline to hire a particular applicant even though such person was given security clearance.

Conclusion

These are the recommendations of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York. The Committee itself sets its recommendations in their proper perspective in the concluding words of the Chapter on Liberty and Security.

> It is in the spirit of the people that the final reconciliation of liberty and security must be found. In our tradition liberty and security are complementary and not opposing ideas. Security is gained through liberty rather than in opposition to it. If fear of totalitarianism were to force us into coerced uniformity of thought and belief, we should lose security in seeking it. We have been free to read and to speak and to participate in lawful causes. We have been free to investigate and learn of alien movements. Though this liberty may mean a few misguided individuals become converts to alien causes, the mass of the people will have their loyalty and unity strengthened. Security is enhanced through liberty in scientific and material progress also. Our nation has outstripped its adversaries in the past through the increased power given by intellectual and scientific liberty. It knows no other way.
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> Thus it is that the emphasis on liberty as well as security is essentially conservative in its adherence to established and tested principles. The personnel security program, if modified along the lines that the Committee recommends, will in our opinion have its proper place in halting those who would abuse liberty and will at the same time encourage the continuing growth of the nation's strength through the achievements of its citizens. And the ultimate safeguard of our security and liberty, the spirit of our people, will be fostered and preserved.[31]

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[31] *Id.*, at 27.